Supreme Court, U.S.
FILED
JUL 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL A. RILEY,

Respondent.

On Writ Of Certiorari To The
Supreme Court of Florida

BRIEF ON BEHALF OF COMMUNITY OUTREACH TO VIETNAM ERA RETURNEES, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

DEBORAH C. WYATT
Gordon & Wyatt
416 Park Street
Charlottesville, VA 22901
(804) 296-4130

Counsel for Amicus Curiae

APPELLATE PRINTING SERVICES, INC. HERITAGE BLDG. RICHMOND, VA (804) 643-7789

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

INTEREST OF AMICUS CURIAE.....1

ARGUMENT.....3

WARRANTLESS SURVEILLANCE OF HOMES AT ALTITUDES BELOW FIVE HUNDRED FEET VIOLATES CORE FOURTH AMENDMENT PROTECTIONS.....3

A. An altitude of 400 feet is not a public thoroughfare.....12

B. Helicopters present special dangers of intrusiveness.....17

CONCLUSION.....23

TABLE OF AUTHORITIES

Page

CASES:

California v. Ciraolo,
476 U.S. 207 (1986).....i,3,6
10,11,12
13,17

Dow Chemical Company v. United States,
476 U.S. 227 (1986).....10,11

Goldman v. United States,
316 U.S. 129 (1942).....8,10

Katz v. United States,
389 U.S. 347 (1967).....7,8,10
12

Letcher v. Garrett, No. 87-3605
(4th Cir., filed July 28, 1987).....3,9,10
13,18,19
20

NORML v. Mullen, 608 F.Supp. 945
(N.D.Cal. 1985).....9,17,20

Oliver v. United States,
466 U.S. 170 (1984).....15,16

Olmstead v. United States,
277 U.S. 438 (1928).....8

People v. Sabo, 185 Cal. App. 3d 845, 230
Cal. Rptr. 170 (Ct. App. 1986).....17

Riley v. State,
511 So.2d 282 (Fla. 1987).....9

Silverman v. United States,
365 U.S. 505 (1961).....8

Wellford v. Commonwealth,
227 Va. 297, 315 S.E.2d. 235 (1984).....5

CONSTITUTIONAL, STATUTORY,
AND REGULATORY PROVISIONS:

U.S. Const. amend. IV.....passim

49 U.S.C. § 1304.....7

49 U.S.C. § 1301(29).....14

14 C.F.R. § 91.79.....12,14

OTHER AUTHORITY:

4 W. BLACKSTONE, COMMENTARIES 1618
(Lewis. ed.).....4

1 COKE, INSTITUTES 18 (19th ed. 1832).....7

WEBSTER'S THIRD NEW INTERNATIONAL
DICTIONARY (1971).....13

No. 87-764

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL A. RILEY,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF ON BEHALF OF COMMUNITY OUTREACH TO VIETNAM ERA RETURNEES, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Community Outreach to Vietnam Era Returnees (COVER) is an private, non-profit Virginia corporation whose purpose is to provide counseling to Virginia's Vietnam veterans. It files this brief with the consent of both

parties [1], and urges that the decision below be affirmed.

Since its inception in 1979, COVER has counseled approximately two thousand veterans of the Vietnam War. In connection with this service, COVER has had occasion to observe the stress which has been caused to Vietnam veterans by low-flying helicopter surveillance of their homes, as is currently carried out annually across Virginia at altitudes admittedly as low as 200 feet as part of Virginia's "Marijuana Eradication Program".

For many veterans, who are for the most part law-abiding citizens who have put their lives on the line to fight enemies of this country, the low-altitude buzzing of their homes and yards through use of large, military helicopters is disturbingly similar to the tactics employed against the enemy in the Vietnam conflict.

This Court may decide that the constitutional guarantee of privacy in one's home and curtilage does not prevent the warrantless helicopter surveillance of such areas at low altitudes. Such a decision would likely

---

[1] Letters of consent have been filed with the Clerk of this Court.

have a profound impact on Virginia's Vietnam veterans by legitimizing Virginia's present program [2].

ARGUMENT

WARRANTLESS SURVEILLANCE OF HOMES AT ALTITUDES BELOW FIVE HUNDRED FEET VIOLATES CORE FOURTH AMENDMENT PROTECTIONS.

The sanctity of the home has always commanded a special protection both under the Fourth Amendment to the United States Constitution and under the common law upon which it was based. It is where "privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207, 213 (1986). The home is a haven where one can relax, be oneself, retreat from the rest of the world. It is the "home base" from the troubles which dog one elsewhere.

Justice William Blackstone said of the common law, "And the law of England has so particular and tender a regard to the immunity of a man's house that it styles it his castle and will never suffer it to be violated with

---

[2] This program is presently being challenged in the Fourth Circuit Court of Appeals by five citizens, none of whom has any criminal record. See Letcher v. Garrett, No. 87-3605 (4th Cir., filed July 28, 1987). A decision in Letcher is being held in abeyance pending the outcome in this case by order dated March 18, 1988.

impunity." 4 W. BLACKSTONE, COMMENTARIES 1618 (Lewis ed.) He continued, "For what is more sacred, what more inviolate, than the house of every citizen?" [3] Id. (quotation omitted).

The sanctity of the home was so special to the drafters of this country's Constitution that it was explicitly protected not only in the Fourth but also the Third Amendment. And so important to the drafters of the Constitution was the haven of a home that, without a warrant based "upon probable cause, supported by Oath or affirmation,...", U.S.Const. amend IV, the home stands inviolate even when it houses evidence of criminal wrongdoings and even when this deference allows criminal activity to go undetected. This is the price our society was, at the time the Constitution was drafted, and hopefully still is prepared to pay to preserve this psychologically and sociologically important part of life, a private home.

Yet this concept of home has never been confined to an actual main structure. At the time the Fourth

---

[3] The actual quote was in Latin: Quod enim sanctius, quid omni religione munitius; quam domus uniuscujusque civium?

Amendment was written, a home was often a collections of buildings joined by a yard, and many private, central activities of life were conducted outside of any central structure. E.g., Wellford v. Commonwealth, 227 Va. 297, 315 S.E.2d. 235 (1984). Cooking was commonly performed outside the house, as were laundering and other cleaning tasks. Even bathing has often been conducted outside a main building, either in the open or in a separate structure. Similarly, outhouses, significantly called "privies", have been commonplace in this country's history.

Though today many people live in apartment houses, having chosen to limit their privacy to the physical insides of four walls, the private lives of a significant percentage of this country's citizens still involve the use of a yard, or curtilage. For many citizens, the front yard and back remain as important a refuge from the rest of the world as the house physically under a roof. Bathing may in some cases still occur outside. Many country dwellers continue to have privies, or outhouses, and continue to air their laundry on lines in their yard.

It is not just rural dwellers, however, who have

privacy interests in the open spaces connected with their home. Homes with an authentic Spanish design often have patios, large open spaces in the middle of the house. Suburban dwellers often share private social moments as they relax in their backyards. Their patios may not be in the center of the home, but they are no less private, especially where other factors, such as fences or woodland, protect the patios from public view.

Thus, the walls of a house do not establish the perimeters of the privacy of a "home" protected by the Fourth Amendment. Rather, the curtilage around a home is, for privacy purposes, part of the home itself. "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically,..." California v. Ciraolo, 476 U.S. at 212-13 (1986).

It is therefore beyond argument that our citizens have a reasonable, in fact heightened, expectation of privacy in their curtilages as part of their homes. E.g., Ciraolo. This expectation is so firmly entrenched in our common law and societal values that specific proof

of subjective expectation of privacy in the home areas has never been required to ward off warrantless searches. Rather, the privacy expectation in the home is established de jure by the Fourth Amendment itself. E.g. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("a man's homes is,..., a place where he expects privacy,...").

At common law, however, the rights associated with a home included all of the airspace over the property as well. It was said that ownership of land extended to the periphery of the universe. 1 COKE, INSTITUTES 18 (19th ed. 1832). [4] This was the common law at the time the Fourth Amendment was adopted.

This was only altered by Congress' subsequent passage of 49 U.S.C. § 1304, providing the way for modern air transportation by providing for "freedom in transit". Accordingly, in this century, expectation of privacy, even while in the curtilage, is not an expectation from

---

[4] The Latin quotation is: "Cujus est solum ejus est usque ad coelum".

all possible viewing, as airplanes now regularly traverse the airways. Rather, the expectation is necessarily limited by the knowledge that, far overhead, a member of the public may view the general outline of the house, the location of the trees, a car and even the physical location of a faceless person. This is part of the realities and necessities of modern life.

Yet this reality does not alter the reasonable expectation of privacy from anything closer or more intrusive than this. For those whose yards are not otherwise viewable by the public, it does not alter the reasonable expectation that they and their lives will remain basically anonymous and unobserved while in the privacy of their curtilages.

However, with air transportation came the ability to surveil by air. What is new and physically possible will be tried by eager law enforcement officials. See, e.g., Katz v. United States, 389 U.S. 347 (1967) (wiretap), overturning Olmstead v. United States, 277 U.S. 438 (1928) (wiretap), and Goldman v. United States, 316 U.S. 129 (1942) (bugging device); Silverman v. United States, 365 U.S. 505 (1961) (spike mike driven into wall).

Not content with surveillance from normal airspace, government agents throughout the country, see, e.g., Letcher v. Garrett, No. 87-3605 (4th Cir., filed July 28, 1987); NORML v. Mullen, 608 F.Supp. 945 (N.D. Cal. 1985), remanded, 796 F.2d 276 (9th Cir. 1986), amended, 828 F.2d 536 (9th Cir. 1987); Riley v. State, 511 So.2d 282, (Fla. 1987), have begun to surveil at lower than normal public airspace, at altitudes where precious anonymity is lost, where private activities and faces, not viewable to the public, may be seen and scrutinized.

This case then presents one of the latest, and perhaps most constitutionally dangerous, technological assaults on privacy, the intentional use of helicopters to fly over homes, there to descend to altitudes low enough to allow government agents to see what the general public cannot, and to do so without any probable cause whatsoever to believe that criminal activity is being conducted.

The issue of aerial surveillance of the home, like other issues involving technological assaults on

protected privacy, see, e.g., Katz v. United States, overturning Goldman v. United States, has become an issue waiting to probe once again this country's commitment to the Fourth Amendment and to its continued vitality, and to force anew a review of the purpose of that amendment.

For if descents to 400 feet are constitutionally permissible in this case, so are descents to 200 feet, as is now being challenged in Letcher v. Garrett, as are descents to fifty feet, and, in fact, warrantless searches of the curtilage by land, and the death knell of home privacy has been sounded.

Yet this Court's pronouncements in the recent cases of California v. Ciraolo, 476 U.S. 207 (1986), and Dow Chemical Company v. United States, 476 U.S. 227 (1986), do not invite such eradication of the Fourth Amendment. In Ciraolo and Dow, the Court addressed for the first time the Fourth Amendment implications of aerial surveillance. Ciraolo involved an attempt to suppress evidence gained by surveillance at 1000 feet; Dow involved high-altitude aerial photographs of a commercial facility.

In both decisions, the Court recognized the

important, reasonable, and therefore legitimate privacy expectations not only in a physical dwelling house but equally in the curtilage around it. In Ciraolo, the Court stated, "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." 476 U.S. at 212-13. In Dow, the Court noted, "We find it important that this is not an area immediately adjacent to a private home, where privacy expectations are most heightened." Id. at 237 n.4.

While recognizing the reasonable expectation of privacy in the curtilage, the Court also recognized that the Fourth Amendment does not require "law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Id. at 213. Because -- and only because -- the evidence in Ciraolo was obtained from "public navigable airspace", id., in what amounted to a "public thoroughfare" (1000 feet), id., where "[a]ny member of the public" could have been, id., it was seen in plain view, not by virtue of a search.

Yet because new technologies can result in other

forms of unreasonable intrusion, Katz v. United States, 389 U.S. 347 (1967), this Court's opinion went further. It passed the surveillance in Ciraolo through a second test: whether it was conducted in an intrusive manner. As discussed below, helicopter surveillance below 500 feet is not subject to logical plain view analysis and, moreover, such low altitude surveillance presents an inescapable tendency to intrusiveness.

A. An altitude of 400 feet is not a public thoroughfare.

Altitudes for air traffic are established by the Federal Aviation Administration (FAA). See 14 C.F.R. § 91.79. Those regulations provide that "no person may operate an aircraft below" the following altitudes: 1000 feet over the highest obstacle within a radius of 2000 feet, when over congested areas; 500 feet above any person, vessel, vehicle or structure in noncongested areas.

The FAA, recognizing the special services that may be provided by helicopter, then allows an exception for helicopters, providing that helicopters may be operated at less than the minimum altitudes under certain

conditions there set forth, including compliance with routes and altitudes prescribed by the Administrator.

This exception does not mean that altitudes under 500 feet may be considered normal public thoroughfares. Webster supplies the following definition of "thoroughfare":

> 1: a way or place through which there is passing:...
> 2: an unobstructed way open to the public
> 3: an important street or highway....

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2380 (1971).

This definition squares with the analysis in Ciraolo. If evidence can by seen from a road along which the public may legally be travelling, then an officer need not "shield his eyes" when he too travels along such a roadway.

Yet the public does not travel at 400 feet. The lowest altitude which the public may use as "a way or passage through" or as "an important [aerial] street or highway" is 500 feet. Even this low an altitude is seldom used, by the public or by governments, according to the record in Letcher v. Garrett, Joint Appendix at 285, 302, 355 & 363, and is only permitted for air traffic while over noncongested areas. The

public does not travel back and forth under 500 feet.

The FAA itself does not view altitudes under 500 feet as public thoroughfares. "Navigable airspace" is defined by federal law, namely: "airspace above the minimum altitudes...." 49 U.S.C. § 1301 (29). 14 C.F.R. § 91.79 then provides that helicopters "may be operated at less than the minimums...." The fact that helicopters are exempted from the minimum does not change the minimum, which stands at 1000 feet and 500 feet, depending on area. 14 C.F.R. §91.79 (b) and (c). Rather, this language is an explicit recognition that the minimum altitude remains at 500 feet.

Florida basically acknowledges that the flight involved in this case, a flight under 500 feet, was a flight below the minimum altitude established for navigable air space and that it was, therefore, not in navigable airspace. Petitioner's Brief on the Merits at 29-30. However, Florida argues for some "bright line" rule, which rule is never enunciated but which would, presumably, allow flights under 500 feet.

Yet the need for and utility of a "bright line" approach serves yet another compelling reason for why

surveillance under 500 feet should not be permitted under Fourth Amendment law. If the open-ended helicopter exception determines what may be considered normal public airspace for plain view purposes, then the exception would swallow the rule, and all airspace, including six inches above the ground, becomes plain view since no altitude is wholly precluded for helicopters.

Such an analysis of the Fourth Amendment question makes meaningless verbiage out of this Court's discussion of "public navigable airspace" and the 1000 foot altitude in Cirasolo, since under such an analysis all airspace becomes public navigable airspace. It further makes meaningless this Court's efforts in Oliver v. United States, 466 U.S. 170 (1984), since all land, including one foot out a backdoor, including an enclosed patio, would become in essence an "open field" for purposes of governmental intrusion.

The error in such an analysis can be further seen by considering the equivalent situation on the ground. A person might leave a sidewalk and take a shortcut across someone's front lawn. Certainly this does not create a new "public thoroughfare". Even if the owner were to

give special permission to the person to do so, making the shortcut "legal", this does not make the path "public" and an officer taking the same shortcut for surveillance purposes would not be in plain view of the house or what goes on inside. Cf. Oliver v. United States, 466 U.S. 170 (1984) (trespass in open fields and in curtilage distinguished for purposes of Fourth Amendment protection).

So it is here. The fact that the FAA has granted an exemption to helicopters to descend below 500 feet for special purposes does not make this lower altitude a public thoroughfare. Surveillance under 500 feet is simply not in plain view.

That the 500 foot minimum is established by the FAA rather than the Constitution does not affect the constitutional analysis. The FAA has established, as it was charged to do, those altitudes which accommodate interests in air travel with air safety and physical intrusiveness. Expectations of privacy, which once ascended above a home to an infinite altitude, are now curtailed to the extent one must expect anonymous flights high overhead, and in no case closer than 500 feet.

There is no justification for encroaching even more upon the sanctity of the home by removing this remaining privacy security zone.

The FAA's regulations have established the public air highways. So established, constitutional analysis must proceed therefrom just as a constitutional question involving viewing from off a paved roadway would revolve around the road in existence, not turn on speculation that the road ought to be widened.

In light of all of the above, it is simply beyond serious dispute that, when government agents descend below 500 feet to surveil curtilages, they are departing from any plain view vantage point and are viewing what the public normally cannot see. Such surveillance, without probable cause and a search warrant, violates the Fourth Amendment. See, e.g., NORML v. Mullen; People v. Sabo, 185 Cal.App.3d 845, 230 Cal. Rptr. 170 (Cal. App. 1986), cert. denied sub nom. California v. Sabo, __U.S.__, 107 S.Ct. 2200 (1987).

B. Helicopters present special dangers of intrusiveness.

As the Supreme Court noted in California v. Ciraolo, 476 U.S. 207 (1986), "aerial observation of curtilage may

become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." Id. at 216 n.3. Thus, the sheer ability to view what is otherwise hidden itself makes surveillance intrusive.

In this case, the government implicitly admits that the lower altitudes are sought to enable officials to see what otherwise they cannot. Therefore it is admitted that, whatever they look at during such low surveillance, the officials are viewing "objects ... otherwise imperceptible to police or fellow citizens." Id.

Not only objects but persons otherwise hidden from public examination, who perhaps are working or sunbathing without regard to their clothing, are suddenly exposed to view. At 200 feet, the altitude presently used by the Virginia State Police for marijuana surveillance, faces can be discerned and recognized. Joint Appendix at 267-68, Letcher v. Garrett, No. 87-3605 (4th Cir., filed July 28, 1987). Public anonymity is destroyed.

Not only are the flights intrusive because they "disclose to the senses" what is "otherwise imperceptible

to police or fellow citizens", they are also physically intrusive. In the record of Letcher v. Garrett, the government conceded that the Bell UH-1H (Huey) military helicopters generally used for marijuana surveillance could cause wind disturbance on the ground at 200 feet. Joint Appendix at 231. The record in that case contained undisputed evidence that the helicopter surveillance as conducted at 200 feet blew clothes off a clothesline, broke limbs off a tree, frightened children, frightened and greatly disturbed elderly individuals, and even blew over an outhouse. E.g., Joint Appendix at 31-33, 45-46 & 108-09, Letcher v. Garrett. It was not disputed in that case that the military helicopters were noisy and disruptive from the ground, causing approximately three times more noise and wind disturbance than average civilian helicopters, and were sufficiently noisy that the victims below could not even converse at a shout. Joint Appendix at 272-73, 305 & 318, Letcher v. Garrett.

Florida, though on the one hand urging an elusive "bright-line" rule, acknowledges exceptions when helicopters are used in a harassing manner or are physically intrusive, though Florida never defines or

even describes what it would consider to be physically intrusive. The very need for such exceptions, drawn from Ciraolo, further undercuts the feasibility of Florida's fuzzy "bright line".

Moreover, contrary to Florida's implication that abuses could be easily kept to a minimum, the records in the cases of Letcher v. Garrett and NORML v. Mullen, 608 F.Supp. 945 (N.D. Cal. 1985), if not logic alone, quickly disprove this hypothesis. Violations and abuses would be virtually impossible to police in any effective manner once the 500 foot minimum were discarded. The evidence in Letcher v. Garrett, for example, indicated that, despite numerous citizen complaints, the government never determined that any pilot had ever violated a directive. Joint Appendix at 231 & 554, Letcher v. Garrett. Without a pilot's confession, it would be difficult if not impossible for an isolated, rural civilian, on the ground, to prove in any court the special harassing nature and/or physical intrusiveness of any particular flight. Such abuse can only be effectively policed when governmental surveillance is confined to the altitudes of normal public air traffic.

For all these reasons, the only feasible "bright line" is that which establishes that surveillance in normal navigable air space, that is above 500/1000 feet — and only such aerial surveillance — is in "plain view".[5]

It is no new discovery that what cannot find a home in logic must retreat to an emotional enclave. In the present case, the weight of Florida's argument relies not on sound analysis of Fourth Amendment law or Fourth Amendment history. As pointed out, Florida never even once defines its "bright line", whether, for example, this line would allow all aerial surveillance, including one foot off the ground. Rather than dwelling on such questions of logic, Florida resorts to the emotional rhetoric of the "war on drugs", making such emotionally-charged statements as:

> The practical law enforcement issue at stake in this case is the degree to which we must surrender in the war on drugs.

---

[5] Of course, if a helicopter needed to descend for some other lawful and neutral purpose, such as for emergency medical care, and during the descent evidence of a crime were viewed, this would fall within traditional plain view analysis. It is below 500 feet that the neutrality of the flight becomes relevant.

Petitioner's Brief on the Merits at 27; see also Brief of Airborne Law Enforcement Association, Inc., as Amicus Curiae at 3 ("war against drugs").

COVER supports legitimate law enforcement efforts towards the eradication of any illegal activity. Yet even were warrantless, low-flying surveillance of the curtilages of the populace important to such efforts, which it is not [6], even rape, kidnapping, and murder have never justified warrantless searches of the homes of innocent and guilty alike. Such rhetoric as the "war on drugs", itself now used as a "drug" on the masses as has been observed by commentators, ought not to be allowed to lull this country into discarding precious, fundamental tenets upon which this country was based.

---

[6] As the evidence in the record of Letcher v. Garrett, No. 87-3605 (4th Cir., filed July 28, 1987), indicates, only a minute percentage of marijuana manufacturing occurs within the curtilages. E.g. Joint Appendix at 105, 122-158, with 226 (number of occasions marijuana retrieved from curtilages in 1985 program), compared with 242-251 (overall seizures for 1985).

CONCLUSION

The only feasible as well as constitutional rule regarding aerial surveillance is one which prohibits aerial surveillance below normal public thoroughfares of 500 feet or above.

Accordingly, the judgment below should be affirmed.

Respectfully submitted,

DEBORAH C. WYATT
Gordon & Wyatt
416 Park Street
Charlottesville, VA 22901
(804) 296-4130

Counsel for Amicus Curiae

June 1988